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September 11, 2017

By Fax

The Honorable Victor Marrero
U.S. District Court
for the Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007-1312

Karsch v. *Blink Health Ltd.*, No. 17 Civ. 3880 (VM)

Dear Judge Marrero:

We represent Blink Health Ltd. ("Blink"), Geoffrey Chaiken and Matthew Chaiken (collectively, the "Defendants"). We write, as discussed at the telephonic conference held on September 6, 2017, to advise the Court of Defendants' intentions with respect to responding to the complaint in this matter.

Defendants appreciate the Court's careful attention to the parties' pre-motion letters, and the guidance the Court offered regarding the breach of contract claim. While we continue to believe that claim is legally deficient, and subject to dismissal pursuant to Rule 12, in light of the Court's guidance, which Defendants have given the utmost consideration, we shall not move to dismiss that claim at this time. Defendants will demonstrate in time—either on a motion for judgment on the pleadings or for summary judgment—that the breach of contract claim is contradicted by the parties' written agreements and objective fact.

Defendants respectfully submit, however, that the balance of the claims in the complaint are subject to dismissal under black letter law as to which there can be no reasonable debate, and we intend to ask the Court to dismiss them pursuant to Rule 12(b)(6).

With the benefit of briefing, we submit that the Court will agree that all of these claims are legally insufficient on their face and therefore should not proceed past the pleading stage. Dismissal of these claims, which will not require the resolution of disputed factual issues, will streamline the case and will likely reduce litigation costs—an important concern for Blink, a consumer health startup company that is using its financing to lower prices and subsidize lifesaving medications for America's most vulnerable populations, the 70 million plus Americans without insurance or who are underinsured. More specifically:

- *Fraud-based Claims (claims 1-4)*: Defendants understand and respect the Court's guidance that upon review of the complaint, the fraud-based claims comply with Rule 9(b). While we again respectfully disagree, Defendants shall not move to dismiss on that basis. However, it remains the case that every single one of the supposed misstatements underlying Plaintiff's fraud claims is *the same* as the alleged breaches underlying Plaintiff's contract claim and that Plaintiff is seeking the exact same damages for all such claims. Under longstanding law, Plaintiff's fraud claims are therefore subsumed by his contract claim and cannot be separately pursued. In addition, Plaintiff, who admits in his complaint and in the parties' transaction documents that he is a sophisticated party, signed a contract with an integration clause stating that all material terms are set forth in the writing—and what is more, *expressly disclaiming any reliance on extra-contractual statements*. Under these circumstances, Plaintiff cannot show reasonable reliance on any supposed misstatements as a matter of established law. These points require dismissal of the fraud claims, without regard to any factual allegations and based strictly on the face of the contracts.

- *Implied Covenant (claim 6)*: Plaintiff's implied covenant claim is impermissibly duplicative of his contract claim because both claims are based on entirely the same supposed "breaches" and seek the same damages. Moreover, it is clear law in New York that one cannot imply duties beyond those set forth in a contract through the implied covenant.

- *Unjust Enrichment (claim 7)*: Plaintiff's complaint is predicated upon the allegation that there exists a "binding and enforceable" contract between the parties (the validity of which Defendants do not contest). And, the basis for Plaintiff's unjust enrichment claim is exactly the same as the basis for his contract claim. New York law bars an unjust enrichment claim where, as here, the challenged conduct is governed by a concededly valid contract.

- *Breach of Fiduciary Duty and Accounting (claim 8)*: This claim is also impermissibly duplicative of Plaintiff's contract claim because it too is based on the same allegations as and seeks the same damages as the contract claim. Moreover, Plaintiff is Blink's contractual counterparty. And, under clear New York law, companies do not owe fiduciary duties to convertible note holders (who are not equity holders pre-conversion). Thus, even assuming all facts in the complaint to be true, there is absolutely no legal basis on which to conclude that

Blink is Plaintiff's fiduciary. As such, Karsch is not entitled to the equitable remedy of an accounting, which requires the existence of a fiduciary duty.

- *Negligent Misrepresentation (claim 9)*: Again, as Blink's contractual counterparty, Plaintiff has not pled and cannot credibly plead, as a matter of well-established law, any "special relationship" giving rise to negligence-based duties. And, in any event, this claim is barred by New York's economic loss rule and is also impermissibly duplicative of Plaintiff's contract claim because it is based on the same allegations as and seeks the same damages as the contract claim.

Defendants' motion will in no way delay the progress of the case; we can be prepared to file it as soon as September 18, 2017, a week from today. We further would suggest the Court take up the suggestion of Plaintiff's counsel on the recent telephone conference for "targeted" discovery.

At the core of this case is whether Blink Health had the right to pre-pay the convertible note that Plaintiff entered into. The conditions for conversion are quite clear in the note, and they require Blink to have issued certain Series A equity shares in order to trigger Plaintiff's conversion rights. More specifically, the governing documents for Plaintiff's convertible note provided that it would convert into Blink equity under either of two scenarios: (1) automatically, "upon the issuance and sale by [Blink] of Series A Preferred Shares resulting in a minimum aggregate $1,000,000 in gross proceeds," or (2) at Mr. Karsch's request, "at any time after any Series A Preferred Shares have been issued by [Blink]." (Compl. ¶ 9; Compl. Ex. F at 17–18 (Note § 2(a)).)

Plaintiff alleges this occurred. Targeted discovery on the question of the occurrence of this condition for conversion will show that Plaintiff's allegation is demonstrably false: that condition did not occur, and indeed Plaintiff expressly *demanded* that Defendants return his funds, with interest. We respectfully submit that staging discovery in this fashion would be the most efficient use of the parties' and the Court's resources.

We are available at Your Honor's convenience for a conference to discuss next steps.

Respectfully submitted,

Andrew J. Ehrlich/SIH

Andrew J. Ehrlich

cc: Counsel of Record (via email)

Plaintiff is directed to respond by 9-14-17, by letter not to exceed three (3) pages, to the matter set forth above by defendant. Upon review of the response the Court may schedule a conference and provide further guidance as to whether motion practice would be warranted.

SO ORDERED.

9-11-17
DATE

VICTOR MARRERO, U.S.D.J.